82-1960

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

EARL BRENNAN, et al.,

Petitioners,

vs.

CITY OF LOS ANGELES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND DISTRICT, DIVISION FIVE

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QUESTIONS PRESENTED

1. When the owner of vacant property is deprived of all viable use of his property because a highly publicized plan to acquire the property for public use (accompanied by the filing of an action to condemn the property) has made it impossible to use, develop, rent, or sell the property, and the governmental acquisition is unreasonably delayed for a decade, do the Fifth and Fourteenth Amendments entitle the property owner to just compensation for the unreasonable delay?

2. When publicity and unreasonable delay accompanying the condemnation of property for a public project deprive the owner of all viable use of the property for a decade, has the property been de facto taken within the meaning of the Fifth and Fourteenth Amendments?

3. When the Supreme Courts of the several states have reached conflicting conclusions on the standards for determining a de facto taking of property within the meaning of the U.S. Constitution, ought this Court resolve such unseemly disagreement in interpreting the same federal Constitutional guarantee?

PARTIES TO THE PROCEEDING

The Petitioners are:

Earl Brennan

Henry C. Aalst

Des K. Ames

Howard O. and Virginia A. Bailey

James L. Bergen

John M. Bonino

Ephraim E. and Viola H. Brenton

John Burns

Nick and Viivi Darden

Darren, Inc.

Ernest A. and Dolores M. Diaz

Jacques Giacobino

Rocco Guarnaccia

Ms. Hiroko Kuwano

Lawrence C. and Katherine M. Harris

Richard S. Higa

Raymond Hill

Ms. Laura B. Hoxie

Mrs. Elizabeth Logue Hyatt

Victor C. Johnson and H. Irene Johnson

Kinglet Corp.

Dr. Louis J. and Marian E. Klingbeil

Ms. Lynette Rennick Landini

Murrell B. and Maxine Leister
Gary Leister
Gerald K. and Kathy M. Nakata
Laurence and Jacqueline Nassif
Mrs. Pauline C. Olson
Paragrin, Inc.
Robert Perkins
Mrs. June Pollack
Irone C. and Carol J. Roberts
Louie Rodriguez
E. H. and Crystal F. Ruehlmann
Mr. Armand Saltman
Walter F. and Waltrud Schmid
Albert C. and Clara L. Schmidt
Michel E. and Rina Schwartz
Miguel M. and Maria Sifuentes
Oscar and Joyce Sesma
Sherston Dist. Corp.
Leroy and Suzanne Silvio
Frank M. and Charlotte M. Silvio
Spencer R. and Laura C. Smith
John and Fern G. Spindler
Klaas and Albertine J. Tilstra
Robert Lee Watson
Mabel Kim Young

The Respondent is the City of Los Angeles, California

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Petitioners (hereafter the Property Owners) respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Second District, Division Five.

THE OPINION BELOW

The opinion of the Court of Appeal is published as *City of Los Angeles v. Property Owners* (1982) 138 Cal.App.3d 114, 187 Cal.Rptr. 667. A copy is App. A.

JURISDICTION

This is an eminent domain case in which parcels of vacant land owned by the Property Owners were acquired by the City of Los Angeles for the creation of a new airport.

The acquisition began with much fanfare in 1968, when the City's Board of Airport Commissioners announced that it would acquire 17,000 acres of land to create an "Intercontinental" airport at Palmdale, California, a rural part of Los Angeles County.

The City immediately passed a bond issue to raise the necessary money to purchase the property and invested the proceeds.

Ten years passed before a trial was held to determine the just compensation due the Property Owners.

The publicity generated by the City about the "Intercontinental" airport project, and the pendency of the condemnation action, destroyed the market for the subject properties. They could be neither sold, nor leased, nor developed, nor even used as security for loans. For all practical purposes, this was no longer private property.

The Property Owners sought compensation for the de facto taking effected by this unreasonable ten year delay. The trial court held there had been a de facto taking in 1972, and awarded interest from that date as Constitutionally mandated just compensation. (The trial court's findings of fact and conclusions of law are App. E. The trial court's judgment is App. D.)

On appeal, the Court of Appeal, Second District, Division Five, held there could be no de facto taking, as there had been no physical invasion of the subject properties and no *legal* restraint on their use. (App. A) Moreover, the Court of Appeal held as an abstract matter of law (contrary to the actual facts found by the trial court) that the owners of vacant property held for investment suffer no damage because of delay. (Compare App. A, p. 10 [Court of Appeal] with App. E, pp. 13-14 [findings of fact].)

The Judgment of the Court of Appeal was rendered December 14, 1982 (App. A).

A timely Petition for Rehearing was denied by the Court of Appeal January 11, 1983 (App.B).

A timely Petition for Hearing was filed in the California Supreme Court. After extending its time to act, the California Supreme Court denied the Petition March 2, 1983. Justices Mosk and Richardson believed the Petition should have been granted. (App. C)

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

> ". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> "SECTION 1. . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

RAISING THE FEDERAL QUESTION

The Answers to the City's condemnation Complaints, Cross-Complaints filed against the City in the condemnation cases, and Complaints in separate inverse condemnation cases brought by the Property Owners against the City (all of which were consolidated for trial) alleged that the City's unreasonable delay had effected a de facto taking of

the subject properties without compensation, in violation of the just compensation and due process guarantees of the Constitution. The federal Constitutional question was thus raised at the earliest possible time, and reiterated in every brief filed in the trial court and on appeal. The trial court found a de facto taking. The Court of Appeal reversed.

STATEMENT OF THE CASE [1/]

Before August 1968, the area around Palmdale was experiencing significant activity in the purchase and sale of land. The area was ready for development, and its utility was enhanced by the addition of freeway access and water. Property values increased.

Then, in August 1968, the City's Board of Airport Commissioners announced (with great media fanfare, but no advance leaks) that a new 17,000 acre "Intercontinental" airport would be created in Palmdale.

With the City's announcement, there was no longer a market for the properties within the proposed airport boundaries. As the trial court found:

> "20. As a practical matter, after August 21, 1968, the owners of the subject parcels herein could not sell their properties because of the actions of the City described above, although legally they could do so." (App. E, p. 8)

1/ The trial court's judgment is supported by findings of fact (Appendix E). On appeal, the City did not contest any of the findings. Thus, as a matter of California procedural law, factual issues decided by the trial court are not subject to dispute. (E.g., ***Rosenberg v. Raskin*** [1947] 80 Cal.App.2d 335, 339; ***Haynes v. Gwynn*** [1967] 248 Cal.App.2d 149, 151.)

Moreover, the City sought and received the cooperation of the County of Los Angeles and the City of Palmdale building departments. Owners of property within the proposed airport who sought to build were told of the impending project and of the City's intent to acquire the property (App. E, p. 4). No building permits were issued within the proposed airport boundaries after October 1969.

Meanwhile, the City's acquisition project moved slowly. Eminent domain complaints were not filed until August and September 1972 (App. E, p. 6) — FOUR YEARS AFTER THE PROJECT'S ANNOUNCEMENT. Another 2 years passed before the City made any effort to *serve* the complaints on the Property Owners (App. E, p. 6) [2/]

Although the City did attempt to purchase some properties without condemnation, the City's "negotiation" technique was to send a curt letter stating that the property had been appraised (without any explanation of how the appraiser had arrived at his value [RT 203, 205]) and the City would buy it at that price. The price was not negotiable. (RT 164)

The man who headed the City's acquisition effort, Mr. Miller, testified that he was aware the Property Owners' land could not be sold because of the project, and that owners in the area had told him of their inability to sell. (RT 147) [3/] He knew they were suffering because they couldn't sell and had to pay taxes and make payments on their trust deeds or lose their properties. (RT 264-265)

There were several causes for the delay.

2/ Service was not made until *after* the Property Owners had filed and served inverse condemnation complaints.

3/ This was an admission by the City that there was no market for the subject properties, rendering useless any further action by the Property Owners to attempt to sell land for which there were no buyers.

First. The City assigned only 2 (sometimes 3) acquisition agents to this 17,000 acre acquisition project, rather than the 10 to 12 which expert testimony showed that the project deserved. (RT 106, 369)

Second. The need for the airport began to lose its urgency in 1970 with the advent of jumbo jets which carried more passengers per takeoff.

Third. As the project was outside the City of Los Angeles, the City had to pay property taxes on the property it owned (App. E, p. 14). The taxes on the property within the airport project were approximately *$1 million dollars per year*. Delay in acquisition meant avoidance by the City of this million dollar per year tax burden (App. E, p. 14).

Fourth. The City *had* the money to buy the properties from the proceeds of a bond issue (App. E, p. 14). Until the properties were purchased, however, the City could (and did) invest the money at market interest rates which were double the municipal bond interest rates the City was paying on its bonds. (App. E, p. 7).

On a project of this size, expert testimony established that 95% of the property should have been acquired within 4 years of the 1968 announcement. (RT 276, 365) Because of this testimony, the trial court found the subject properties were de facto taken in 1972. (App. E, p. 14)

The City's excessive delay was devastating to the Property Owners. They were without a market for their properties and could do naught but await the City's pleasure. As the trial court found:

> "36. Fairness and equity require that the Property Owners be compensated for the *unreasonable delay* in acquisition of their properties. The area was one of the few large open

spaces in the County available for development in any direction. The airport project *completely prevented* any such development. Meanwhile, the Property Owners have had to bear the cost of real property *taxes*, the *loss of use* of the value of their asset, and the *loss of their ability to sell* their land and use the proceeds as they choose, since August 21, 1968.

"Simultaneously, *the City has been free of the burden of paying real property taxes* on land for the airport (which is outside the City's corporate boundaries), and *the City has been earning interest* on the proceeds of a bond issue the City has sold to obtain the money to pay for the Property Owners' land.

"37. The City, acting in its *entrepreneurial capacity* to conduct a *profit-making venture* outside its boundaries, by announcement of intent to take the Property Owners' land, filing of condemnation actions, recording of lis pendens, complicating of obtaining permission to build on the Owners' properties, *prevented the natural development of the land and deprived the owners of the ability to sell or borrow on the security of the property*, and *effective denial of ability to use their properties*, . . .

"38. The City has unreasonably delayed the taking of the Owners' properties by not promptly filing condemnation [and] not serving summons within a reasonable time.

"39. The Property Owners have been damaged by these delays.

> "40. Prejudgment interest at the legal rate is an appropriate measure of just compensation due the Property Owners since the August 28, 1972, date of 'de facto' taking (or for the unreasonable delay in processing acquisition of the Owners' properties.) (App. E, p. 14; emphasis added.)

The Court of Appeal reversed:

- Because there was neither physical invasion nor *legal* restraint, it was held there could be no *de facto* taking. (App. A, p. 9)
- Because the properties were purchased for investment, it was held that there *could* be no damage from the delay (App. A, p. 10), even though the trial court found as a matter of *fact* that there *was* damage (App. E, pp. 13-14).

The California Supreme Court refused (over the protests of Justices Mosk and Richardson) to hear the case (App. C).

By their actions, the California courts have again demonstrated their determination to deny Constitutional protection to owners of property, notwithstanding this Court's repeated admonitions that property rights must be afforded the same Constitutional protection as other fundamental rights. See, e.g., ***Lynch v. Household Finance Corp.*** (1972) 405 U.S. 538, 552:

> ". . . a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. [Citing the works of Locke, John Adams, and Blackstone.]"

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This Court has been no stranger to "the taking issue" in recent years. Generically, the issue is whether actions of a governmental agency have so trenched on the rights of private property owners that the property has been taken, requiring compensation under the Fifth and Fourteenth Amendments.

The cases recently addressed by this Court have been regulation cases, where some police power regulation is claimed to have effected a taking either by restricting the owner's ability to use the property (*Penn Central Transp. Co. v. City of New York* [1978] 438 U.S. 104; *Agins v. City of Tuburon* [1980] 447 U.S. 255; *San Diego Gas & Elec. Co. v. City of San Diego* [1981] 450 U.S. 621) or by permitting others to use the property (*Kaiser-Aetna v. United States* [1979] 444 U.S. 164; *Pruneyard Shopping Center v. Robins* [1980] 447 U.S. 74; *Loretto v. Teleprompter Manhattan CATV Corp.* [1982] ____U.S.____, 73 L.Ed.2d 868.)

This case presents a different aspect of the taking issue — one which is equally deserving of this Court's attention, and one which has created disparate interpretations of the same federal Constitutional guarantee by the courts of different states.

The issues here focus on the situation where a government agency has decided to acquire private property, announces its intention, files suit to condemn, stultifies the use of the property because of its announced intention and pending suit to condemn, and then unreasonably delays

acquisition while the property owner is left helplessly — and ever so slowly — twisting in the wind, awaiting payment of his Constitutionally promised just compensation. [4/]

This Court has not directly addressed this aspect of condemnation delay. It has, however, held that compensation in the form of pre-judgment interest must be paid where payment is delayed after pre-trial possession is taken. (E.g., ***Jacobs v. United States*** [1933] 290 U.S. 13, 16-17; ***Seaboard Air Line R. Co. v. United States*** [1923] 261 U.S. 299, 306; ***Shoshone Tribe v. United States*** [1937] 299 U.S. 476, 497.) And the Courts of Appeals have held that compensation for the kind of condemnation delay experienced here is Constitutionally mandated. (E.g., ***United States v. 15.65 Acres*** [9th Cir. 1982] 689 F.2d 1329, 1334; ***Foster v. City of Detroit*** [6th Cir. 1968] 405 F.2d 138, affirming [E.D. Mich. 1966] 254 F.Supp. 655.)

California is to the contrary.

This Court has also held that whether the actions of a government agency have de facto taken property must be examined on a case-by-case basis to determine the impact of the government activity on the property owner. (E.g., ***Loretto,*** ____ U.S. at ____, 73 L.Ed.2d at 876; ***Penn Central***, 438 U.S. at 124.) Physical invasion has expressly been held *not* to be required. (***Penn Central***, 438 U.S. at 122, fn. 25)

4/ Here, the delay was ten years from the project's announcement until the valuation trial. During that time, the Property Owners could do nothing with their properties (except make tax and trust deed payments). Also during that time, the City raised the money to buy the subject properties through a bond issue (paying low municipal bond rates) and — instead of paying the Property Owners — invested the money for a handsome return at market interest rates.

California is to the contrary, concluding that the Constitutional de facto taking concept is rigidly frozen into a mold requiring physical invasion or *legal* [5/] restraint. (App. A, p. 9)

The Supreme Courts of the several states are in conflict on the standards for determining a de facto taking, some requiring physical invasion or legal restraint, others not. *All* purport to be interpreting the same U.S. Constitutional guarantee. The extent of Constitutional protection a citizen receives is not to be dependent on the jurisdiction in which he lives. Any other conclusion would violate not only the essence of federalism, but the equal protection clause of the Fourteenth Amendment as well.

This Court's attention is needed to ensure uniform protection of the Constitutional rights of property owners who are asked to give up their property for the common good.

CALIFORNIA'S RIGID AND RESTRICTIVE INTERPRETATION OF A DE FACTO TAKING OF PROPERTY WITHIN THE MEANING OF THE U.S. CONSTITUTION CONFLICTS WITH ALL PREVIOUS DECISIONS OF THIS COURT

"De facto taking" is a common sense concept applied where the actions of a government agency interfere so significantly with a property owner's ability to use his property that the property is adjudged to have been taken by the governmental action. In such a circumstance, the taking is held to have occurred de facto even though legal

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5/ Restraint in *fact* is apparently not sufficient for the California courts to find a taking *de facto*.

title has not passed and even though a condemnation action may not yet have been filed.

In deciding whether the Fifth and Fourteenth Amendments command a finding that a taking has occurred de facto and compensation must be paid, this Court described the task of the judiciary as:

> ". . . determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. [citation]" (***Penn Central***, 438 U.S. at 124)

By definition, to determine whether a taking (or anything else) is accomplished "de facto," the facts must be examined with an open mental attitude to determine whether that which is forbidden to be done directly has been accomplished covertly. 6/

Indeed, in making decisions regarding de facto happenings in other fields, it is plain that this Court has insisted on examining the underlying facts and their impact on the parties. (E.g., ***Board of Education v. Harris*** [1979] 444 U.S. 130 [de facto segregation]; ***United States v. Citizens and Southern Nat'l Bank*** [1975] 422 U.S. 86 [de facto branch banks]; ***Hughes Tool Co. v. TWA*** [1973] 409 U.S. 363 [de facto corporate control]; ***Griffin v. Illinois*** [1956] 351 U.S. 12 [de facto denial of appeal rights].)

6/ In the words of Justice Frankfurter, the Constitution proscribes ". . . sophisticated as well as simple-minded . . ." depredations. (***Lane v. Wilson*** [1939] 307 U.S. 268, 275)

In the property context, Justice Brennan aptly summed up the rule in his four Justice dissenting opinion in ***San Diego Gas & Elec Co.***, 450 U.S. at 652-653: [7/]

> "But 'the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does.' [Citations.] It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a 'taking,' and therefore a de facto exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property. [Citations.]"

Rather than laying down any rigid rules for determining when a de facto taking occurs, this Court has interpreted the Fifth and Fourteenth Amendments as requiring an ad hoc examination of *facts*. (E.g., ***Loretto***, ____U.S.____, 73 L.Ed.2d at 876; ***Penn Central***, 438 U.S. at 124)

The factors which must be examined are the economic impact of the governmental action on the property owner, the extent to which the governmental action interferes with reasonable, investment-backed expectations, and the character of the governmental action. (***Loretto***, ____U.S. at ____, 73 L.Ed.2d at 876; ***Penn Central***, 438 U.S. at 124)

7/ As this Court may be aware, because of Justice Rehnquist's concurring opinion in ***San Diego Gas & Elec. Co.***, the Courts of Appeals have generally acknowledged Justice Brennan's dissent as expressing the views of a majority of this Court on the substantive law discussed. ***Hernandez v. City of Lafayette*** (5th Cir. 1981) 643 F.2d 1188, 1198-122; ***Devines v. Maier*** (7th Cir. 1981) 665 F.2d 138, 152; ***Barbian v. Panagis*** (7th Cir. 1982) 694 F.2d 476, 482, fn 5; ***In re Aircrash in Bali*** (9th Cir. 1982) 684 F.2d 1301, 1311, fn 7; ***Martino v. Santa Clara Valley Water Dist.*** (9th Cir. 1983) ____F.2d____, ____; ***Fountain v. Metro Atlanta Rapid Transit Authority*** (11th Cir. 1982) 678 F.2d 1038, 1043. But see ***Citadel Corp. v. Puerto Rico Highway Auth.*** (1st Cir. 1982) 695 F.2d 31, 33, fn 4.

Comparing the California Court of Appeal's analysis in this case with the flexible Constitutional standard established by this Court, it is apparent that California refuses to accept this Court's rulings as to the federal Constitutional law of takings.

- The economic impact on the Property Owners was devastating. As the trial court found, they could not sell, lease, or develop their land, nor even use it as security for loans. (App. E, pp. 13-14)
- The interference with reasonable, investment-backed expectations was total. The Property Owners bought the land with the expectation that they could either use it, sell it, or at least borrow against it. As the trial court found, they could do none of these because of the City's actions. (App. E, pp. 13-14)
- The governmental action was an unreasonably long, drawn-out acquisition. The project was undertaken in the City's entrepreneurial capacity, and it was expected to generate a profit for the City. (App. E, p. 14) During this decade-long acquisition, the City obtained the money to purchase the property at low, municipal bond rates, and invested it at high, market interest rates. [8/] (App. E, p. 7) This delayed acquisition had motives: the City not only made a profit on its bond issue, by wheeling and dealing in the

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8/ In effect, the trial court simply held that the City was a constructive trustee of the money and ordered some of the profits disgorged.

> securities market, it avoided paying a million dollars a year in property taxes. (App. E, p. 14) [9/]

Applying this Court's *Penn Central* analysis, there was a de facto taking. [10/]

But California has held, as a matter of law, there cannot be a de facto taking in the Constitutional sense unless there is either a physical invasion of the property, or direct *legal* restraint on the property owners, (App. A, p. 9)

Such rigidity cannot comport with this Court's case-by-case *factual* analysis. The California position offers no protection to owners of property in cases like this.

VACANT PROPERTY IS DE FACTO TAKEN WHEN CONDEMNATION TAKES YEARS TO CONCLUDE. CALIFORNIA'S CONTRARY HOLDING CONFLICTS WITH A RECENT DECISION OF THE NINTH CIRCUIT COURT OF APPEALS

California's appellate courts have developed an economically and Constitutionally unrealistic view of the impact of protracted pre-condemnation delay on the

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9/ California government agencies pay property taxes on property owned by them which, as here, is outside their corporate boundaries. (App. E, p. 14)

10/ In *U.S. v. General Motors* (1945) 323 U.S. 373, this Court defined property as ". . . the right to possess, use and dispose of [a thing]." (323 U.S. at 378) In *Kaiser Aetna*, this Court held that governmental "removal" of one important "stick" in the bundle of property rights (there, the right to exclusive possession) is a de facto taking. (444 U.S. at 176; cf *Loretto*, ____US at ____, 73 L.3d.2d 882) Here, the rights of use and disposition were plainly removed from the Property Owners' bundles.

owners of vacant property held for investment. Cases such as the one at bench (App. A, p. 10), ***City of Los Angeles v. Waller*** (1979) 90 Cal.App.3d 766, and ***City of Los Angeles v. Lowensohn*** (1976) 54 Cal.App.3d 625 PRESUME [11/] that delay causes *no* damage because the owners were "merely" planning to hold it until the price increased sufficiently to sell it.

But holding property as an investment means more than owning it until it hypothetically reaches a maximum value. It means being *able* to sell it *when* one's needs or wisdom dictate. This the City prevented. It also means being able to use the property as security for a loan. This the City likewise prevented.

No one either buys property slated for condemnation or lends money on its security. (See ***Miller v. United States*** [Ct Cl 1980] 620 F.2d 812, 839.)

Protracted delay can be the equivalent of taking the property.

The assumption of the California courts conflicts with the recent, cogent analysis of the Court of Appeals for the Ninth Circuit in ***United States v. 15.65 Acres*** (9th Cir. 1982) 689 F.2d 1329, 1334:

> "The effect of a condemnation suit on unimproved land held for development is significantly different from its effect on developed property. While a condemnation suit may change the value of improved property somewhat, the owner usually continues to enjoy the beneficial use of

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[11/] It cannot be emphasized forcefully enough that these opinions are *not* based on fact. Indeed, at bench, the presumption is *contradicted* by the facts found by the trial court. (See App. E, pp. 13-14)

his land until a declaration of taking is filed. [Citation.]

"On the other hand, *when the property condemned is* intended for development and sale, and remains *unimproved*, the owner following a condemnation suit frequently loses more than just value; he may be *deprived of all economic use of his land*. While the action is pending, the land is almost impossible to sell, although that alone is not sufficient to create a taking [Citation.] . . . [N]o one would improve the property after the date of valuation because the government could acquire it at a pre-improvement price. [Citations.] *The owner of unimproved land is thus left with the liabilities which follow title but none of the benefits*, save the right ultimately to be paid for the taking.

"Under these circumstances, we hold it proper to invoke the rule that *when the government deprives an owner of all economic use of his land, there has been a taking.*" (Emphasis added.)

This same recognition that delay can cause such injury to the owner of vacant property that it is a taking of property may be seen in *State v. Nordstrom* (N.J. 1969) 253 A.2d 163; *Stewart & Grindle, Inc. v. State* (Alas. 1974) 524 P.2d 1242; and *Lange v. State* (Wash. 1976) 547 P.2d 282.

Not for the first time, [12/] California has chosen to interpret the federal Constitutional protection of the rights of private property owners in a way which is contrary to the decisions of federal courts and other state courts.

DECISIONS OF THE STATE SUPREME COURTS ARE IN CONFLICT AS TO THE STANDARDS FOR DETERMINING A DE FACTO TAKING OF PROPERTY WITHIN THE MEANING OF THE U.S. CONSTITUTION

In interpreting the protection afforded private property rights under the Fifth and Fourteenth Amendments, the State courts have split into two distinct camps:

- One applies a rigid rule that no de facto taking may be found unless there is a physical invasion of the property or a *legal* restraint of the owner's ability to use it.
- The other applies this Court's *Penn Central* test of flexible examination of the *facts* to determine their *impact* on the owner.

The rigid camp is typified by New York. In the influential case of *City of Buffalo v. J. W. Clement Co., Inc.* (NY 1971) 269 N.E.2d 895, 903, the Court of Appeals held:

12/ Compare *San Diego Gas & Elec. Co. v. City of San Diego* (1981) 450 U.S. 621, 647 (Brennan, J. dissenting, but appearing to represent the view of the majority of the Court on the merits); *City of Los Angeles v. Venice Peninsula Properties* (1982) 31 Cal.3d 288, *cert. granted sub nom. Summa Corp. v. California*, No. 82-708,____ U.S.____.

> ". . . it is clear that a *de facto* taking requires a *physical entry* by the condemnor, a *physical ouster* of the owner, a *legal interference* with the physical use, possession or enjoyment of the property or a *legal interference* with the owner's power of disposition of the property." (Emphasis added.)

The rigid ***Clement*** holding has been adopted by a number of other jurisdictions (including California [App. A, p. 9): e.g., ***Lipson v. Colorado State Dept. of Highways*** (Col.App. 1978) 588 P.2d 390; ***Gould v. Land Clearance for Redevelopment Auth.*** (Mo. 1980) 610 S.W.2d 360; ***Uvodich v. Arizona Bd. of Regents*** (Ariz.App. 1969) 453 P.2d 229; ***Howell Plaza, Inc. v. State Highway Comm.*** (Wis. 1979) 284 N.W.2d 887; ***City of Chicago v. Loitz*** (Ill. 1975) 329 N.E.2d 208.

Other state courts have adhered to this Court's ruling that open-minded factual examination is Constitutionally required.

> "The issue becomes what activities on the part of the condemning authority can be considered as depriving an owner of his property rights. There is no precise formula or specific method for this determination." (***Detroit Bd. of Ed. v. Clarke*** [Mich.App. 1979] 280 N.W.2d 574, 576)

> "The precise dimensions of a 'substantial interference' sufficient to amount to a taking in the constitutional sense are not always clear since the concept of substantial interference is not a static one, but one that has developed over the years in response to the changing needs of our society." ***Textron, Inc. v. Wood*** [Conn. 1974] 355 A.2d 307, 315)

The flexible examination thesis is also exemplified by ***State v. Nordstrom*** (N.J. 1969) 253 A.2d 163, 165-166; ***Stewart & Grindle, Inc. v. State*** (Alas. 1974) 524 P.2d 1242, 1247; ***Lange v. State*** (Wash. 1976) 547 P.2d 282, 287-288; ***Conroy-Prugh Glass Co, v. Commonwealth Dept. of Transp.*** (Pa. 1974) 321 A.2d 598; ***Suess Builders Co. v. City of Beaverton*** (Ore. 1982) 656 P.2d 306. [13/]

The upshot of this is that the protection of a citizen's *federal* Constitutional rights depends on the jurisdiction in which his rights are invaded.

But the protection given *federal* Constitutional rights cannot vary because of the side of the Hudson River (compare ***Nordstrom*** with ***Clement***), or Lake Michigan (compare ***Clarke*** with ***Loitz***), or the forty-second parallel (compare ***Suess Builders*** with the case at bench) on which one lives.

Equal protection of the law rebels at such a thought. Our federal system is dependent upon *federal* rights receiving the *same* treatment in *all* courts.

The present disparate treatment of individuals not only has an unconscionable impact on individual citizens, it has a potential impact on the federal judiciary as well. For, as State supreme courts become plainly aligned with the rigid camp, one can expect knowledgeable practitioners to avoid the courts of those states completely, filing their actions in

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13/ The lower federal courts adhere to this Court's flexible standard. E.g., ***Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*** (9th Cir. 1977) 561 F.2d 1327, 1330-1331; ***Thomas W. Garland, Inc. v. City of St. Louis*** (8th Cir. 1979) 596 F.2d 784, 787; ***Drakes Bay Land Co, v. United States (Ct Cl 1970) 424 F.2d 574, 586.***

the U.S. District Courts, [14/] which apply this Court's requirement of flexible factual examination.

CALIFORNIA'S DENIAL OF JUST COMPENSATION FOR UNREASONABLE DELAY IN CONDEMNATION CONFLICTS WITH THE THEORY OF NUMEROUS DECISIONS OF THIS COURT AND THE HOLDING OF A RECENT DECISION OF THE NINTH CIRCUIT COURT OF APPEALS

The general subject of litigational delay is hardly new. Nor has the subject gone unmentioned in condemnation cases.

This Court has not dealt with the specific kind of delay presented here, where a project is announced and litigation begun and then years pass before either payment is made or possession is taken by the government.

However, this Court has on numerous occasions held that delay between the taking of physical possession and payment of compensation requires the payment of just compensation in the form of pre-judgment interest. (E.g., ***Jacobs v. United States*** [1933] 290 U.S. 13, 16-17; ***Seaboard Air Line R. Co. v. United States*** [1923] 261 U.S. 299, 306; ***Shoshone Tribe v. United States*** [1937] 299 U.S. 476, 497.)

14/ Wouldn't a property owner's attorney be foolish (if not courting malpractice) to now sue in California courts, for example, rather than a District Court subject to the Court of Appeals for the Ninth Circuit? (Compare the opinion at bench [App. A] with ***15.65 Acres*** and ***Richmond Elks***.)

This Court summarized the law in *Seaboard*, 261 U.S. at 304, 306:

> "The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. [Citation] It rests on equitable principles, and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken. [Citation] He is entitled to the damages inflicted by the taking.
>
> * * *
>
> "Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value, paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added. The legal rate of interest, as established by the South Carolina statute was applied in this case. This was a 'palpably fair and reasonable method of performing the indispensable condition to the exercise of the right of eminent domain; namely, of making "just compensation" for the land as it stands, at the time of taking.' [Citation]"

Conceptually, there is no difference between this case and *Seaboard*. Though physical possession was taken in *Seaboard*, the result here was no different than if physical possession had been taken. The trial court found that the subject properties could neither be used nor sold. (App. A, pp. 13-14)

The Court of Appeals for the Ninth Circuit recently decided a case which is indistinguishable from this case (except the delay there was significantly less than the decade at bench): ***United States v. 15.65 Acres*** (9th Cir. 1982) 689 F.2d 1329. The Ninth Circuit's analysis is quoted at pp. 16-17 above. In a nutshell, it held that announcement and pendency of the project deprived the owners of the ability to make any use of the land. That constituted a de facto taking. Interest was awarded from the date of value. (689 F.2d at 1334)

What the Ninth Circuit did in ***15.65 Acres*** is *precisely* what the *trial* court did here: it held the properties to be de facto taken in 1972 and awarded interest from the 1972 date of value. The California Court of Appeal reversed, holding there could be no such award.

The decision of the California Court of Appeal on a federal Constitutional issue cannot be reconciled with the decisions of this Court and the Ninth Circuit.

CONCLUSION

There is nationwide confusion as to the proper standards by which to determine a de facto taking of property within the meaning of the United States Constitution.

The rule adopted by California and a number of other states is out of harmony with this Court's teachings. As this situation arises most often in cases of large-scale property acquisitions (like the 17,000 acre airport project at bench), hundreds or, as here, thousands of innocent citizens are simultaneously injured.

Whether the injured citizens receive the just compensation mandated by the United States Constitution, however, depends solely on what state they are in, or whether the litigation is brought in state or federal court. Such a situation makes a mockery of the concept of equal protection of the law.

The Property Owners pray that a writ issue.

Respectfully submitted,

JERROLD A. FADEM
MICHAEL M. BERGER
of FADEM, BERGER & NORTON
A Professional Corporation
Attorneys for the Petitioners

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION FIVE

CITY OF LOS ANGELES,
a municipal corporation,
Plaintiff and Appellant,

v.

PROPERTY OWNERS,
Defendants and Respondents.

CITY OF LOS ANGELES,
a municipal corporation,
Plaintiff and Appellant,

v.

MARJORIE A. CRUM, et al.,
Defendants and Respondents.

2d Civil Nos. 59058 and 60702
(LASC Nos. C-37925 and C-87429)

APPEALS from judgments of the Superior Court of Los Angeles County. Hon. William A. Caldecott and Hon. Harry L. Hupp, Judges. Reversed.

Ira Reiner, City Attorney, James H. Pearson, Senior Assistant City Attorney, and James L. Spitser, Assistant City Attorney, for Appellant.

Fadem, Berger & Norton, by Michael M. Berger, for Respondents.

The City of Los Angeles (appellant or the City) appeals from a judgment awarding ***Klopping*** damages in the form of interest in the amount of $268,500, attorneys fees of $104,000, appraiser's fees of $20,000 and miscellaneous costs of $9,805 to Property Owners (respondents or Property Owners). [1/]

On August 21, 1968, the Board of Airport Commissioners passed a resolution to condemn respondents' property except for three parcels. The City announced at this time that an intercontinental airport would be opened in Palmdale at the site of respondents' property. The Los Angeles Council adopted an Ordinance of Condemnation on February 4, 1969. Subsequently, The Board of Airport Commissioners passed another resolution of condemnation that included the three parcels excepted in the initial resolution.

Eminent domain proceedings were filed on September 1, 1972. Prior to this time respondents had filed their action against the City for damages for inverse condemnation.

By September 1, 1974, the City had served the summons and complaints in eminent domain on the respondents except for the owners of the three properties originally excluded.

All actions were consolidated and on February 2 to February 10, 1977, the trial of certain legal issues was held before the Honorable Alexander R. Early III. The principal legal issues to be decided at this bifurcated trial were

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1/ The Property Owners are a group of individuals that owned approximately 230 parcels of unimproved real property in the Palmdale area outside the city limits of Los Angeles but in Los Angeles County.

whether there had been a de facto taking of respondents' property and whether they were entitled to ***Klopping*** [2/] damages. The subsequent trial before a jury would determine the value of the property taken under the eminent domain proceedings.

On May 17, 1977, Judge Early rendered his interlocutory judgment in which he found there was no de facto taking by appellant of any of respondents' parcels but there had been an unreasonable delay by appellant in its acquisition of all but three of respondents' properties. With respect to ***Klopping*** damages arising from the unreasonable delay he ruled that evidence on this issue could be presented to the jury where it related to respondents' attempts and subsequent inability to sell their respective properties or their inability to rent or to use or develop their properties.

Approximately three weeks after Judge Early made these rulings, respondents moved to disqualify Judge Early from hearing the case, on the grounds stated in Code of Civil Procedure section 170(5). Thereafter, Judge Early filed his consent to transfer the trial and it was assigned for all purposes to Judge William A. Caldecott.

Judge Caldecott ruled that he would reopen the legal issues concerning the de facto taking and ***Klopping*** damages, but would withhold his decisions on these issues until after the jury trial resolving the fair market value of the various parcels of property.

The jury trial was held covering 32 of respondents' properties. The jury set the total fair market value for said parcels as of September 1, 1972, at $671,250. Prior to trial, appellant's fair market value appraisals for the 32 parcels totalled $488,750. Its final offer for said parcels totalled

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2/ *See* ***Klopping v. City of Whittier***, 8 Cal.3d 39.

$634,375. Respondents' fair market value appraisals for the same property totalled $1,017,000 and their final demand was $913,148.

Following the jury trial Judge Caldecott issued his rulings and judgment. He awarded the respondents interest at the legal rate on the amount of their fair market value awards from August 28, 1972, to the date of payment into court of those awards, based upon a so called de facto taking of respondents' properties. The interest was referred to as ***Klopping*** damages.

Respondents filed their memorandum of costs and disbursements and appellant filed its motion to tax costs. Respondents also filed a motion for award of litigation costs pursuant to Code of Civil Procedure section 1249.3 along with a supplement to that motion. Appellant filed its supplement to motion to tax costs.

Due to the untimely death of Judge Caldecott, the hearing concerning costs and award of litigation costs pursuant to section 1249.3 was assigned to Judge Harry R. Hupp. He ruled that with respect to the 32 parcels respondents were entitled to attorneys fees, appraiser's fees and litigation costs in amounts to be determined later. Subsequently, Judge Hupp awarded respondents attorneys fees in the sum of $100,000, appraiser's fees in the sum of $20,000 and miscellaneous costs of $9,805.04. In a second order after judgment, Judge Hupp awarded respondents an additional $4,000 in attorneys fees.

APPELLANT'S ISSUES ON APPEAL

1. Can the actions of appellant constitute a de facto taking of respondents' properties?

2. Are respondents entitled to receive ***Klopping*** damages arising from an "unreasonable delay" by appellant in the acquisition of respondents' properties in the form of interest added to value of the property taken?

3. If there was no de facto taking of respondents' properties and respondents are not entitled to receive any ***Klopping*** damages, are respondents entitled to receive attorneys fees, appraiser's fees and miscellaneous costs pursuant to Code of Civil Procedure section 1249.3 (now Code Civ. Proc., § 1250.410) and Code of Civil Procedure section 1246.3 (now Code Civ. Proc., § 1036)?

DISCUSSION

Judge Caldecott recognized that he was stepping into virgin territory with his two rulings on a de facto taking and award of damages. In reference to his decisions he stated with unusual candor:

> "But the fact is that all development in the whole area has been stalled by the stalling of the airport . . . .
>
> " . . . there was a substantial stalling by the failure of the City to employ the next backup to properly take over and purchase all of the lands that they wanted to take . . . .
>
> "Along this line there is no doubt that the properties that are involved in this litigation — as far as I know that is probably true with all the remaining parcels of land, is that prior to the taking there was no rental market, there was no sales market.

"They can't contend that they lost rentals because they never had any rentals.

"They have, however, continued to have holding costs by way of frozen assets, taxes, items of that kind that they were bearing while the City proceeded to acquire their property.

"*It does not appear to me to be* ***Klopping*** *damage in the sense specifically covered by the* ***Klopping*** *case.*

"*It may not be a 'de facto taking.'*

"The whole problem lies some place in between these two.

"I cannot help but feel that the proper ultimate decision is to allow the property owners to recover interest on their judgments from the date of valuation in this case.

* * *

"But I don't know of any case really like it. I am aware, of course, of ***Stone*** [***Stone v. City of Los Angeles***, 51 Cal.App.3d 987] and ***Lowensohn*** [***City of Los Angeles v. Lowensohn***, 54 Cal.App.3d 625]. In each instance there were different facts and different findings by Courts.

"The Appellate Courts determined to go along with whatever a trial judge determines factually.

"I want to put my findings on both grounds, Klopping and de facto taking, because I don't know which category could best be supported." (Emphasis added.)

Appellant, encouraged by Judge Caldecott's statements, claims the judge's doubts would have been resolved in its favor had he considered more carefully ***City of Los Angeles v. Waller***, 90 Cal.App.3d 766. The central facts of ***Waller*** are quite similar to those of our present case. Other property owners owned 35 acres in the same airport land acquisition project as the instant case. By way of cross-complaint to the eminent domain proceedings these owners sought inverse condemnation damages. The trial court found no de facto taking. The appellate court in affirming made numerous pertinent comments which are as follows:

> " 'We perceive in eminent domain cases — or "just compensation" cases — various degrees of culpability on the part of the public entity which entitle condemnees to an escalating amount of relief, depending upon the determination of the degree. Unusually oppressive conduct results in a determination of *"de facto* taking" while *delay* is answerable in proximately caused damages. What constitutes oppression, or direct and substantial impairment of property rights by the condemner, is essentially a factual question, one determinable on a case-by-case basis. In the case at bench, the trial court concluded that a de facto taking had not been established, although there was unreasonable delay which could be considered by the jury during the valuation phase of the proceedings.
>
> " 'We agree with the trial court, particularly in view of the fact that there was substantial testimony that the subject property's highest and best use was as an investment, to be held until such time as its value had increased. Defendants

> did not demonstrate that the conduct of the condemner defeated this highest and best use, nor was it demonstrated that the condemner substantially impaired defendants' property rights. A recent case, ***Jones v. People ex rel. Dept. of Transportation*** (1978) 22 Cal.3d 144 [148 Cal.Rptr. 640, 583 P.2d 165], affirmed a judgment for damages because the public entity destroyed — temporarily at least — access to the subject property, a far more extreme situation than that presented here. The contrast persuades us that no de facto taking occurred in the case before us.' " (90 Cal.App.3d at p. 778)

The keystone case of course is ***Klopping v. City of Whittier, supra***, 8 Cal.3d 39. The opinion contains an analysis of "just compensation" that must be paid to property owners in condemnation cases. The standard for "just compensation" is measured by the market value of the property, which is the highest price estimated in terms of money which the land would bring if exposed for sale in the open market. Pre-condemnation activity concerning the property can in certain instances enhance the market value of the property or it can decrease the market values of the properties involved.

In ***Klopping*** the property owners claimed the fair market value of their properties had declined as a result of the defendant's two announcements of intent to condemn made prior to instituting eminent domain proceedings. They contended they were unable to fully use their properties and that this damage was reflected in the loss of rental income. The City of Whittier maintained the property owners were not entitled to recover for losses caused by the pre-condemnation announcements because there was no

physical invasion of plaintiffs' lands nor any direct interference with their possession and enjoyment of their lands which is necessary under a de facto taking theory. The ***Klopping*** court accepted the argument of the City of Whittier stating there was no de facto taking because there was no "physical invasion or direct legal restraint" to support a "taking" before the date set by statute. (Code Civ. Proc., § 1249.) The court then turned to the other issue before it; namely, whether unreasonable delay *after* public pre-condemnation statements was compensable to the property owners. It recognized that delaying tactics could affect the market value of the property and concluded, "Accordingly we hold that a condemnee must be provided with an opportunity to demonstrate that (1) the public authority acted improperly either by unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation; and (2) as a result of such action the property in question *suffered a diminution in market value.*" (8 Cal.3d at p. 53; emphasis added.)

The ***Klopping*** opinion thus emphasizes that damages in such a situation must be measured in terms of increasing or decreasing market values to the property involved.

CONCLUSION

We conclude that the facts of our present case do not establish a de facto taking and the award of damages was in error. There was no oppressive conduct, as defined in ***Klopping*** and ***Waller***, ***supra***, to support the de facto allegations. Although Judge Early's rulings are not before us on this appeal, and they do not influence us one way or the

other, he was correct concerning damages in such a situation. He stated: "With respect to the damages, if any, for said delays evidence of actual damage to said owners may be received arising from their inability to sell their properties after the date of their probable inclusion within the airport project, and of their inability to rent or to use or develop their said properties during said periods of unreasonable delay. Regarding the admissibility of such evidence, the court is bound by and will follow the opinion of the appellate court for this district in ***City of Los Angeles v. Lowensohn***, (1976) 54 Cal.App.3d 625 (hearing denied)." 3/

Here, as in ***City of Los Angeles v. Waller, supra,*** 90 Cal.App.3d 766, it was conceded by respondents that their properties' highest and best use was as an investment to be held until such time as its value had increased. As in ***Waller, supra***, respondents did not demonstrate that the conduct of appellant defeated the highest and best use of their properties nor was there any proof that the acts of appellant substantially impaired their property rights thus affecting the properties' market value. Instead, the damages were awarded by the court on an entirely new theory; namely, that the "Property Owners have had to bear the cost of real property taxes, the loss of use of the value of their assets, and the loss of their ability to sell their land and use of the proceeds as they chose since August 21, 1968."

Our reversal of the award of damages necessitates a reversal of the awards to appellants for attorney's fees, appraiser's fees, and miscellaneous costs. Judge Hupp recognized that these fees and costs were grounded solely

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3/ Judge Caldecott based his award of damages primarily on "holdng costs" paid by appellants. In ***Lowensohn***, we held that evidence of such costs was inadmissible in a similar situation.

on the award of the so-called *Klopping* damages. He made findings of fact relative to this issue, which correctly state the law in such a situation. They are as follows:

> "6. If Judge Caldecott had not awarded the Property Owners legal interest from August 28, 1972, until the date that the fair market value of their respective properties is paid into Court for their benefit, based primarily on a 'de facto' taking and secondarily on *Klopping* damages, then the Final Offers and Final Demands filed herein by the City and the Property Owners, respectively, would have been limited to offers and demands with respect to the issue of the fair market value of each subject property. As a result, the Property Owners would not be considered successful litigants in an inverse condemnation proceeding for the taking of an interest in their respective real properties. In addition, in making the required comparisons, pursuant to C.C.P. §1249.3, to determine the reasonableness of the City's Final Offers and the Property Owners' Final Demands, said Final Offers and Final Demands would be compared by the Court only with the Fair Market Value of the respective subject properties as awarded by the jury.
>
> "7. As compared with the fair market value of the respective subject properties as awarded by the jury, the 'City of Los Angeles' Final Offers' and 'Amended Final Offers', filed on April 26, 1978, and May 3, 1978, respectively, were reasonable, and the 'Property Owners' Offers to Settle Under C.C.P. § 1249.3' and 'Amended Offers to

Settle Under C.C.P. §1249.3', filed on April 26, 1978, and May 1, 1978, respectively, were also reasonable." 4/

The judgments are reversed.

CERTIFIED FOR PUBLICATION

HASTINGS, J.

We concur:

STEPHENS, Acting P.J.
ASHBY, J.

4/ Former Code of Civil Procedure section 1249.3:

"At least 30 days prior to the date of trial, plaintiff shall file with the court and serve a copy thereof on defendant its final offer to the property sought to be condemned and defendant shall in like manner, file and serve a copy thereof on plaintiff its final demand for the property sought to be condemned. Service shall be accomplished in the manner prescribed by Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

"If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the offer of the condemnor was unreasonable and that the demand of condemnee was reasonable, all viewed in the light of the determination as to the value of the subject property, the costs allowed pursuant to Section 1255 shall include all expenses reasonably and necessarily incurred in preparing for and in conducting the condemnation trial including, and not limited to, reasonable attorney's fees, appraisal fees, surveyor's fees, and the fees for other experts, where such fees are reasonable and necessarily incurred to protect defendant's interest prior to the trial, during trail and in any subsequent judicial proceedings in the condemnation action.

"In determining the amount of attorneys fees and expenses to be awarded under this section, the court shall consider written, revised or superseded offers and demands served and filed prior to or during the trial."

Los Angeles, Cal. 1-11, 1983

City of Los Angeles,

vs. 59058

Property Owners, et al. No. 60702

The Court:

The petition for rehearing is denied.

CLAY ROBBINS, Clerk

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102
Mar 2, 1983

I have this day filed Order

HEARING DENIED

Mosk, J.

Richardson, J. OF THE OPINION THAT THE PETITION SHOULD BE GRANTED.

In re: 2 Civ. No. 59058 & 60702

CITY OF LOS ANGELES

vs.

PROPERTY OWNERS

(City of L.A. v. Crum)

Respectfully,

Clerk

LAW OFFICES
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A Professional Corporation
501 Santa Monica Boulevard
Post Office Box 2148
Santa Monica, California 90406
Telephone (213) 451-9951
Attorneys for Property Owners

**SUPERIOR COURT OF
THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

ALVIN D. GARNER, et al.
Plaintiffs
vs.
CITY OF LOS ANGELES, etc.
Defendant.

ALL CASES FILED
IN CASE
NO. C 87429
PER COURT ORDER

LOUIS AIU, et al.,
Plaintiffs,
vs.
CITY OF LOS ANGELES, etc.,
Defendant.

NO. C 80362

AND ALL RELATED CASES

JUDGMENT AS TO RESERVED ISSUES

1. THIS ACTION FOR EMINENT DOMAIN came on regularly for jury trial as to value in Department 40 of the above Court. The trial commenced on April 27, 1978, and continued through May 9, 1978, the Honorable William A. Caldecott, Judge Presiding, sitting with a jury of twelve qualified persons, sworn to try the issues therein.

Burt Pines, City Attorney, Lawrence M. Nagin, Senior Assistant City Attorney and James L. Spitser, Deputy City Attorney, by James L. Spitser, appeared for the CITY OF LOS ANGELES, a municipal corporation.

Fadem, Berger & Norton, by Jerrold A. Fadem, appeared for the PROPERTY OWNERS.

2. These captioned cases were consolidated, and then the parcels set forth on Exhibit A were severed for trial as to valuation of Trial Group 1.

3. Evidence was introduced by each of the parties, and the matter was submitted to the jury. Thereafter, the jury rendered its verdict as to value.

4. Judgment in Condemnation after Trial, and Amended Judgment in Condemnation after Trial, have heretofore been entered upon those 32 verdicts as to value.

5. By those Judgments, issues as to whether there has been a "de facto" taking or unreasonable delay in acquisition of all the parcels in the consolidated actions were reserved for later decision by the Court.

6. The Court now has made its Findings of Fact and Conclusions of Law as to the reserved issues, and based thereon, orders, adjudges and decrees:

- The Owners of the parcels, set forth in Exhibit A are to receive the amount of interest shown thereon as to each parcel.

- The Owners of the parcels, set forth in Exhibit B, are to receive interest at the legal rate from August 28, 1972, until the compensation awarded them is paid into Court for their benefit.
- The matter of costs for Trial of these cases is reserved for future order by the Court.

DATED: July 28, 1978

WILLIAM A. CALDECOTT
Judge of the Superior Court

EXHIBIT A

PARCEL NUMBERS OF PROPERTIES
WHOSE VALUES HAVE BEEN DETERMINED

PARCEL No.	Interest
3022-5-34	$ 6,400.00
3022-5-71	$ 6,100.00
3022-5-75	$ 6,000.00
3022-5-25	$ 6,200.00
3022-5-67	$ 6,600.00
3022-5-64	$ 6,400.00
3022-5-76	$14,500.00
3022-5-41A	$12,400.00
3022-5-77	$12,000.00
3022-5-70	$ 6,100.00
3022-5-69	$14,000.00
3022-5-78	$ 6,100.00
3022-5-72	$12,000.00
3022-5-79	$ 6,100.00
3022-5-59	$ 6,200.00
3022-5-21	$ 6,000.00
3022-5-60	$ 6,200.00
3022-5-32	$ 6,400.00
3022-5-68	$ 6,600.00
3022-5-37	$ 6,100.00
3022-5-17	$ 6,100.00
3022-5-55	$15,100.00
3022-5-58	$ 7,300.00
3022-5-64A	$ 6,100.00
3022-5-45	$ 6,500.00
3022-5-54	$14,400.00
3022-5-80	$14,000.00
3022-5-49	$ 6,100.00
3022-5-39	$ 6,100.00
3022-5-40	$ 6,200.00
3022-5-41	$14,800.00
3022-5-42	$ 7,400.00

EXHIBIT B

PARCEL NUMBERS OF PROPERTIES WHOSE VALUES HAVE NOT YET BEEN DETERMINED

3025-2-4 (Arb. 4B)
3025-2-59 (Arb. 5B)
3025-2-34
3025-2-60 (Arb. 9C)
3025-2-58 (Arb. 6D)
3025-2-53
3025-2-60 (Arb. 6C)
3025-2-60 (Arb. 6D)
3025-2-29C
3025-2-4 (Arb. 8C)
3025-2-30
3025-2-57 (Arb. 4A)
3025-2-55 (Arb. 1A)
3025-2-57 (Arb. 6C)
3025-2-58 (Arb. 3C)
3025-2-58 (Arb. 6A)
3025-2-59 (Arb. 4C)
3025-2-56 (Arb. 2B)
3025-2-58 (Arb. 7A)
3025-2-59 (Arb. 4D)
3025-2-58 (Arb. 6C)
3025-2-59 (Arb. 11A)
3025-2-28A
3025-2-56 (Arb. 1B)
3025-2-58 (Arb. 10)
3025-2-58 (Arb. 13)
3025-2-4 (Arb. 9C)
3025-2-57 (Arb. 5B)
3025-2-4 (Arb. 10B)
3025-2-60 (Arb. 9B)
3025-2-59 (Arb. 9B)
3025-2-59 (Arb. 9C)
3025-2-4 (Arb. 9B)
3025-2-59 (Arb. 12A)
3025-2-56 (Arb. 2A)
3025-2-58 (Arb. 8D)
3025-2-60 (Arb. 8B)
3025-2-4 (Arb. 6D)
3025-2-59 (Arb. 7C)
3025-2-59 (Arb. 10D)
3025-2-57 (Arb. 4C)
3025-2-60 (Arb. 11A)
3025-2-4 (Arb. 9D)
3025-2-59 (Arb. 9A)
3025-2-4 (Arb. 6C)
3025-2-4 (Arb. 8A)
3025-2-57 (Arb. 7B)
3025-2-59 (Arb. 7A)
3025-2-62
3025-2-59 (Arb. 12C)
3025-2-57 (Arb. 2B)
3025-2-57 (Arb. 2D)
3025-2-4 (Arb. 4A)
3025-2-57 (Arb. 3A)

3025-2-59 (Arb. 6B)
3025-2-57 (Arb. 7A)
3025-2-60 (Arb. 11D)
3025-2-55 (Arb. 2B)
3025-2-60 (Arb. 10D)
3025-2-4 (Arb. 15B)
3025-2-57 (Arb. 5A)
3025-2-4 (Arb. 12A)
3025-2-4 (Arb. 12B)
3025-2-4 (Arb. 10A)
3025-2-58 (Arb. 8B)
3025-2-58 (Arb. 7B)
3025-2-4 (Arb. 12C)
3025-2-59 (Arb. 12D)
3025-2-58 (Arb. 5B)
3025-2-55 (Arb. 2A)
3025-2-4 (Arb. 9A)
3025-2-60 (Arb. 6B)
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**SUPERIOR COURT OF
THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

ALVIN D. GARNER, et al.,
Plaintiffs,
vs.
CITY OF LOS ANGELES, etc.,
Defendant.

ALL CASES FILED
IN CASE
NO. C 87429
PER COURT ORDER

LOUIS AIU, et al.,
Plaintiffs,
vs.
CITY OF LOS ANGELES, etc.,
Defendant.

NO. C 80362

AND ALL RELATED CASES

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The within consolidated cases having come on regularly for the trial of certain bifurcated legal issues on February 2, 1977, in Department 15 of the above-entitled court before the Honorable Alexander R. Early, III, Judge Presiding, and the City of Los Angeles being represented by Burt Pines, City Attorney, Lawrence M. Nagin, Senior Assistant City Attorney and James L. Spitser, Deputy City Attorney, and the property owners being represented by Jerrold A. Fadem of Fadem, Berger, McIntire & Norton; whereupon evidence, both oral and documentary, having been introduced by both parties; the cause having been introduced by both parties; the cause having been briefed, argued and submitted for decision; and the Court, on April 14, 1977, having announced its intended decision, the Court makes the following:

FINDINGS OF FACT

1. City of Los Angeles (hereinafter "City") is a municipal corporation organized and existing under and by virtue of the laws of the State of California and located in the County of Los Angeles, State of California.

2. City's Department of Airports (hereinafter "Department") is a proprietary department of the City of Los Angeles under the management and control of the Board of Airport Commissioners of the City of Los Angeles.

3. Defendants in the eminent domain (direct condemnation) proceedings herein and plaintiffs in the inverse condemnation proceedings herein (hereinafter referred to as

"owners") are the owners of parcels of unimproved real property as described in the pleadings herein, all located in the Antelope Valley, near the city of Palmdale, County of Los Angeles, State of California.

4. On August 21, 1968, the Board of Airport Commissioners of the City of Los Angeles adopted Resolution No. 4852 which:

(a) Defined and described the approximately 17,500 acre area to be acquired for the Palmdale International Airport (which included all but three of the subject properties; and

(b) Requested that the City Council of the City of Los Angeles adopt an ordinance of condemnation.

5. On February 4, 1969, Ordinance No. 138,130 was passed by the Council of the City of Los Angeles authorizing the condemnation of approximately 17,500 acres of land in the Antelope Valley for airport purposes (including all but three of the subject properties).

6. With the exception of the three subject properties located in the "Eastern Addition," at all times pertinent herein, the subject properties have been located within the boundaries of the Palmdale International Airport (hereinafter referred to as "Airport") acquisition project, as described in said Resolution No. 4852, dated August 21, 1968. Subject Parcel Nos. 3077-9-64D, 3077-9-64F and 3077-9-64J, located within the "Eastern Addition," have been located within the boundaries of the Airport acquisition project since the original boundaries of said project were amended on November 18, 1970.

7. The adoption of said Resolution No. 4852 and Ordinance No. 138,130 were each accompanied by public announcements. The public was able to ascertain the location

and boundaries of the proposed Airport project at any time after August 21, 1968.

8. In September, 1968, the Department commenced the activities necessary to acquire the parcels located within the Airport acquisition project. These activities included obtaining title reports, hiring independent real estate appraisers and preparing maps.

It took approximately one year for the Department to obtain the necessary title reports, which was a reasonable period of time under the circumstances involved herein. The parcels involved herein were all vacant desert parcels. Many of the record owners had, prior to 1968, resold their properties, or portions thereof, under unrecorded contracts of sale.

9. The parcels involved herein were all located outside of the city limits of the City of Los Angeles, most being located within an unincorporated portion of the County of Los Angeles.

10. By a letter dated July 3, 1969, the Department notified the County of Los Angeles that the Department wished to be notified whenever an owner of property located within the Airport acquisition project applied to the County for any land use entitlement, such as a building permit, zone change or lot split.

In response thereto, the Regional Planning Commission of the County of Los Angeles set up a procedure to notify the Department of all such requests. This procedure included informing the applicant of the Airport acquisition project and of City's intention to acquire all property located within the boundaries of the Airport acquisition project. No requests for building permits, zone changes, lot splits or other land use entitlements were, in fact, denied by the County because of said Airport acquisition project.

11. On November 18, 1970, the Board of Airport Commissioners adopted Resolution No. 6020, which added approximately 280 "Eastern Addition" parcels to the Airport acquisition project as previously described in Resolution No. 4852, dated August 21, 1968. Included within said "Eastern Addition" were subject Parcel Nos. 3077-9-64O, 3077-9-64F and 3077-9-64J.

12. On November 18, 1970, the Department contemplated deletion from the Airport acquisition project of those parcels located between 15th Street East and 25th Street East, but took no legally effective action to do so, and, in March 1973, decided against such deletion.

Some owners of parcels located between 15th Street East and 25th Street East were advised by City employees that their parcels had been "administratively" deleted from the Airport acquisition project, but none of those owners acted to their detriment in reliance on said advice.

13. City acquired its first parcel of property within the Airport acquisition project in September, 1969. City acquired no other parcels within said project until September, 1970, nor did it attempt to do so. The Department received site approval for the proposed Airport from the California State Department of Aeronautics on August 4, 1969, and from the Federal Department of Transportation in June 1970. City's regular Airport acquisition program actually commenced in September, 1970.

14. In July, 1971, the City declared a moratorium against further land acquisition for the Airport acquisition project because in February, 1971, a lawsuit (***Sierra Club v. Volpe***, No. 370-71) was filed in Federal Court against the Federal Department of Transportation challenging the adequacy of the Environmental Impact Statement in connection with the Airport acquisition project.

Said litigation endangered the availability of the 53% Federal funding originally contemplated for the Airport acquisition project because, in July, 1971, the Federal Government announced that no Federal funds would be available to City for the Airport acquisition project for an indefinite period of time. This Federal litigation is still pending.

A similar State Court action (***Sierra Club, et al. v. City of Los Angeles, et al.***, Superior Court No. C-39215) was also filed against the City in the Los Angeles Superior Court on September 20, 1972, which is, likewise, still pending.

15. City resumed its Airport land acquisition program of negotiated purchases in August, 1972. By September, 1972, City had filed eminent domain (direct condemnation) proceedings against all of the subject parcels herein, except the three subject parcels in the "Eastern Addition," Parcel Nos. 3077-9-64D, 3077-9-64F and 3077-9-64J. All of the Complaints in Eminent Domain were filed and Summons issued on August 29, August 30 and September 1, 1972.

No Complaints in Eminent Domain have been filed, and no Summons issued, with respect to any of the parcels in the "Eastern Addition," because no final Environmental Impact Report thereon has yet been received. However, the owners of Parcel Nos. 3077-9-64D, 3077-9-64F and 3077-9-64J herein have brought inverse condemnation proceedings against the City.

16. After the filing on August 29, August 30 and September 1, 1972, City made no effort to serve the Summons and Complaints in Eminent Domain upon the property owners herein for a period of two years after said filing. During that two-year period, City did acquire numerous other parcels by negotiated purchase. In addition, during that period of time, City contacted many of the owners of

record and offered to purchase their parcels. City discovered that many of the parcels had been partially or entirely resold by the record owners, prior to 1968, under unrecorded contracts of sale.

The failure to bring these cases to trial within one year after the filing of the Complaints in Eminent Domain is, therefore, the fault of the City, which is, therefore, estopped to assert the provisions of C.C.P. §1249 regarding the date of valuation. (*City of Los Angeles v. Tower* [1949] 90 Cal.App.2d 869, is inapplicable herein, because no estoppel was involved in that case.)

17. Many of the owners of the subject properties herein reside outside of California, particularly in Hawaii. Under the circumstances herein, a period of one year after the filing of the Complaints in Eminent Domain herein would have been a reasonable period of time within which to make service of the Summons and Complaints in Eminent Domain. The Court, therefore, finds that the City unreasonably delayed such service for the period from September 1, 1973 to September 1, 1974.

18. To date, out of approximately 2,800 parcels involved in the Airport — approximately 15,800 acres out of approximately 17,500 acres. Approximately 2,450 of these parcels have been acquired by the City without Court trial. At all times pertinent hereto, the Department has had adequate funds available for the Airport acquisition project, and, at times, has earned as much as 10% on its investments.

19. Property values in the vicinity of the property being acquired by the City as part of the Airport acquisition project increased from August 21, 1968 to mid-1971, at which time they stabilized and subsequently declined.

20. As a practical matter, after August 21, 1968, the owners of the subject parcels herein could not sell their properties because of the actions of the City described above, although legally they could do so.

21 As of the commencement of the trial of legal issues herein, the owners of the subject parcels had not yet obtained independent appraisals of the fair market values of their respective properties. The City had obtained a written appraisal of the fair market value of each subject parcel from one of six reputable independent appraisers, and had made offers to purchase their respective parcels to the owners thereof based upon those appraisals.

The Court finds no lack of good faith on City's part in its negotiations with the owners herein to purchase their respective parcels.

From these facts, the Court makes the following:

CONCLUSIONS OF LAW

22. Code of Civil Procedure Section 1243.1, which first became effective on March 4, 1972, was not violated by the City herein.

23. The Department has no power to acquire property by eminent domain proceedings unless and until authorized to do so by ordinance enacted by the Council of the City of Los Angeles.

24. The owners of the subject parcels herein are not entitled to any recovery under Government Code Sections 7260-7276, inclusive, nor under 42 U.S.C.A. Sections 4601-4655, inclusive, and the applicable regulations thereunder.

25. There was no de facto taking by the City of any of the subject parcels herein.

26. The date of probable inclusion within City's Airport acquisition project of all of the subject parcels herein, except the three subject parcels located in the "Eastern Addition," is August 21, 1968.

27. The date of probable inclusion within City's Airport acquisition project of Parcel Nos. 3077-9-64D, 3077-9-64F and 3077-9-64J, located within the "Eastern Addition," is November 18, 1970.

28. The dates of valuation of the respective subject parcels herein, except the three subject parcels located in the "Eastern Addition," will be the dates of the filing of the respective Complaints in Eminent Domain with respect hereto.

29. The dates of valuation of Parcel Nos. 3077-9-64D, 3077-9-64F and 3077-9-64J, located within the "Eastern Addition," will be the dates of the filing of the respective inverse condemnation actions with respect thereto.

30. The City unreasonably delayed the commencement of eminent domain (direct condemnation) proceedings with respect to all of the subject parcels herein, except the three subject parcels located in the "Eastern Addition," from February 21, 1970 to August 29, 1972. Likewise, with respect to said parcels, the City unreasonably delayed service of the respective Summons and Complaints in Eminent Domain herein from September 1, 1973 to September 1, 1974.

31. The City unreasonably delayed the commencement of eminent domain (direct condemnation) proceedings with respect to Parcel Nos. 3077-9-64D, 3077-9-64F and 3077-9-64J, located within the "Eastern Addition," from May 18, 1972 to the dates of filing of the respective inverse condemnation actions with respect thereto.

32. The City did not engage in any oppressive conduct toward the property owners herein other than the unreasonable delay described above.

33. City is liable for the payment of property taxes on those parcels which it acquires for the Airport acquisition project, because said parcels are located outside of the boundaries of the City of Los Angeles.

34. With respect to the damages, if any, for the unreasonable delay described above, evidence of actual damage to said property owners may be received, arising from any of said owners' attempt, and subsequent inability, to sell their respective properties after the date of their probable inclusion within the Airport acquisition project, and of their attempt, and subsequent inability, to rent or to use or develop their said properties during the above-described periods of unreasonable delay. Regarding the admissibility of such evidence, the Court is bound by, and will follow, the local Court of Appeal opinion in ***City of Los Angeles v. Lowensohn*** (1976) 54 Cal.App.3d 625 (hearing denied).

35. In the event any finding of fact shall be deemed a conclusion of law, such shall be considered a conclusion of law, irrespective of its location under the heading "Findings of Fact." In the event any conclusion of law is held to be a finding of fact, it is to be considered a finding of fact, irrespective of its location under the heading "Conclusions of Law."

DATED: 17 May, 1977

ALEXANDER R. EARLY, III

Judge of the Superior Court

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SUPERIOR COURT OF
THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ALVIN D. GARNER, et al.,
Plaintiffs,
vs.
CITY OF LOS ANGELES, etc.,
Defendant.

ALL CASES FILED
IN CASE
NO. C 87429
PER COURT ORDER

LOUIS AIU, et al.,
Plaintiffs,
vs.
CITY OF LOS ANGELES, etc.,
Defendant.

NO. C 80362

AND ALL RELATED CASES

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

The within consolidated cases came on regularly for the trial of certain bifurcated legal issues on February 2, 1977, in Department 15 of the above Court, before the Honorable Alexander R. Early, III, Judge Presiding.

The City of Los Angeles was represented by Burt Pines, City Attorney, Lawrence M. Nagin, Senior Assistant City Attorney and James L. Spitser, Deputy City Attorney. The Property Owners were represented by Fadem, Berger & Norton by Jerrold A. Fadem. Evidence, both oral and documentary, was introduced by both parties. The cause was briefed, argued and submitted for decision.

Objection to Judge Early was filed under CCP §170(5). Judge Early disqualified himself on June 14, 1977.

The matter was then assigned to the Honorable William A. Caldecott for all purposes.

Pursuant to stipulation and request of the parties, the issues found by Judge Early as to whether there was a "de facto" taking, and what was a proper date of value, were reopened.

Those reopened issues were submitted on the transcript of the Trial before Judge Early, further briefs of the parties, and several further oral arguments.

The Court (Judge Caldecott) found that the date of value for all parcels was August 28, 1972, and ordered the first group of 33 parcels to Trial as to their value as of August 28, 1972.

The Court (Judge Caldecott) reserved for later decision, as to all parcels, its finding whether there was a "de facto" taking or damages from unreasonable delay in acquisition (an issue unresolved by Judge Early).

Trial of the 33 parcels was held from April 27, 1978, through May 9, 1978, before a jury. The value for one parcel was settled during Trial. The jury rendered verdicts as to the other 32.

Those verdicts are the subject of Judgment in Condemnation After Trial, dated June 20, 1978, and Amended Judgment in Condemnation After Trial, dated June 20, 1978.

Thereafter, the Court (Judge Caldecott) heard argument on more occasions and received further briefs. On July 7, 1978, the Court (Judge Caldecott) announced its intended decision as to the bifurcated issues for all parcels, and made the following findings and conclusions to augment the earlier findings and conclusions of Judge Early, and to supersede any which do not conform hereto:

FINDINGS OF FACT

36. Fairness and equity require that the Property Owners be compensated for the unreasonable delay in acquisition of their properties. The area was one of the few large open spaces in the County available for development in any direction. The airport project completely prevented any such development. Meanwhile, the Property Owners have had to bear the cost of real property taxes, the loss of use of the value of their asset, and the loss of their ability to sell their land and use the proceeds as they choose, since August 21, 1968.

Simultaneously, the City has been free of the burden of paying real property taxes on land for the airport (which is outside the City's corporate boundaries), and the City has been earning interest on the proceeds of a bond issue the City has sold to obtain the money to pay for the Property Owners' land.

37. The City, acting in its entrepreneurial capacity to conduct a profit-making venture outside its boundaries, by announcement of intent to take the Property Owners' land, filing of condemnation actions, recording of lis pendens, complicating of obtaining permission to build on the Owners' properties, prevented the natural development of the land and deprived the owners of the ability to sell or borrow on the security of the property, and effective denial of ability to use their properties, has "de facto" taken the Owners' properties as of August 28, 1972.

38. The City has unreasonably delayed the taking of the Owners' properties by not promptly filing condemnation [and] not serving summons within a reasonable time.

39. The Property Owners have been damaged by these delays.

40. Prejudgment interest at the legal rate is an appropriate measure of just compensation due the Property Owners since the August 28, 1972, date of 'de facto' taking (or for the unreasonable delay in processing acquisition of the Owners' properties.)

From these facts and those found by Judge Early not inconsistent therewith, the Court makes the following:

CONCLUSIONS OF LAW

41. The actions of the City "de facto" took the Owners' properties on August 28, 1972.

42. The City's delay in acquisition of the owners' properties, in filing complaints, and serving summons was unreasonable.

43. The Property Owners, of all parcels, are entitled to interest at the legal rate on the amount of their awards from August 28, 1972, to the date of payment into Court of those awards.

The Property Owners of the parcels on Exhibit A are to receive compensation added to their awards in the amount of 7% of their awards per year from August 28, 1972, through June 20, 1978.

44. Costs of trial for these actions are not dealt with herein and are reserved for future order by the Court.

45. If any of the matters denominated Findings of Fact are Conclusions of Law they are to be so considered. If any matters denominated Conclusions of Law are Findings of Fact they are to be so considered.

46. Let judgment be entered accordingly as to the 32 parcels on Exhibit A; and as to the parcels on Exhibit B, the value of which have not yet been determined.

DATED: July 28, 1978

WILLIAM A. CALDECOTT
Judge of the Superior Court

No. 82-1960

IN THE

Supreme Court of the United States

October Term, 1982

EARL BRENNAN, *et al.*,

Petitioners,

vs.

CITY OF LOS ANGELES,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

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Questions Presented.

1. Whether this Court should grant a Petition for Writ of Certiorari when the Petitioners have failed to properly raise any federal question at any prior stage of these proceedings.
2. Whether this Court should grant a Petition for Writ of Certiorari when the decision below was properly placed upon a nonfederal ground.

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No. 82-1960

IN THE

Supreme Court of the United States

October Term, 1982

EARL BRENNAN, *et al.*,

Petitioners,

vs.

CITY OF LOS ANGELES,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

Jurisdiction.

The Petition for Writ of Certiorari (hereinafter "Petition") does not present an important question of federal law. Accordingly, there is a lack of any special and important reasons for reviewing the instant case on writ of certiorari. Further, as Respondent City of Los Angeles (hereinafter "City") will discuss *infra*, this Court should not exercise its jurisdiction because the Petitioners failed to raise properly any federal issue, in violation of Supreme Court Rule 21, and the California Court of Appeal properly rested its judgment on a nonfederal ground.

Statement of the Case.

The Respondent offers the following Statement of the Case as supplemental to that presented in the Petition:

1. August 21, 1968 — Board of Airport Commissioners passed a Resolution of Condemnation, including all but

three of the Petitioners' properties. [CT #1 61 and 164][1]

2. February 4, 1969 — Los Angeles City Council adopted an Ordinance of Condemnation, including all but three of the Petitioners' properties. [CT #1 24, 109 and 165]
3. November 18, 1970 — Board of Airport Commissioners passed a Resolution of Condemnation, including the three Petitioners' properties not included in the Resolution of August 21, 1968. [CT #1 167]
4. September 1, 1972 — By this date, Respondent had filed eminent domain (direct condemnation) proceedings against all of the Petitioners' properties, except the three covered by the Resolution of November 18, 1970. [CT #1 168]
5. September 1, 1974 — By this date, Respondent had served the Summons and Complaints in Eminent Domain on the Petitioners, except the owners of the three properties covered by the Resolution of November 18, 1970. [CT #1 169]
6. February 2 — February 10, 1977 — A Trial of Legal Issues with respect to the Petitioners' properties is held in Department 15 of the Los Angeles Superior Court, the Honorable Alexander R. Early, III, Judge Presiding [CT #1 125-133; RT 21-436]
7. May 17, 1977 — Judge Early made the following rulings:
   A. There was no "De Facto" taking by Respondent of any of Petitioners' parcels. [CT #1 172 and 181]

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[1]The Clerk's Transcript in 2nd Civil No. 59058, containing 361 pages, will be referred to herein as CT #1; the Clerk's Transcript in 2nd Civil No. 60702, containing 502 pages will be referred to herein as CT #2. The Reporter's Transcript, containing 1077 pages, will be referred to herein as RT; the Augmented Reporter's Transcript, containing 60 pages, will be referred to herein as ART.

B. The dates of unreasonable delay by Respondent in its acquisition of all but three of Petitioners' properties were February 21, 1970 to August 29, 1972 and September 1, 1973 to September 1, 1974. [CT #1 172-173 and 182]

C. The dates of unreasonable delay by Respondent in its acquisition of the remaining three of Petitioners' properties were May 18, 1972 to the dates of filing of the respective inverse condemnation actions with respect thereto. [CT #1 173 and 182]

D. Respondent did not engage in any oppressive conduct toward the Petitioners other than the unreasonable delay described above. [CT #1 173 and 182]

E. With respect to the *Klopping* damages, if any, arising from the unreasonable delay described above, evidence of actual unreasonable delay damage to Petitioners may be received, arising from any of Petitioners' attempt(s), and subsequent inability, to sell their respective properties after the date of probable inclusion within the Respondents' Airport acquisition project, and of their attempt(s), and subsequent inability, to rent or to use or develop their properties during the above-described periods of unreasonable delay. Regarding the admissibility of such evidence, the Court will be bound by, and will follow, the California Court of Appeal opinion in *City of Los Angeles v. Lowensohn* (1976) 54 Cal.App.3d 625 (hearing denied). [CT #1 173-174 and 183]

8. June 6, 1977 — Petitioners' attorneys filed their Objections to Judge Early on the grounds stated in Code of Civil Procedure Section 170(5). [CT #1 185]

9. June 14, 1977 — Judge Early filed his Consent to Transfer Trial. [CT #1 202]

10. July 20, 1977 — The instant case was assigned for all purposes to Judge William A. Caldecott. [CT #1 210]

11. August 11, 1977 — Judge Caldecott accepted the instant case for all purposes. [CT #1 216]

12. November 18, 1977 — Judge Caldecott ruled that he would reopen the legal issue previously decided by Judge Early as to whether there was a "De Facto" taking by Respondent of the Petitioners' parcels. [CT #1 225]

13. April 26 — May 9, 1978 — A jury trial to determine the fair market value as of September 1, 1972, of 32 of Petitioners' properties is held in Department 40 of the Los Angeles Superior Court, the Honorable William A. Caldecott, Judge Presiding. [CT #1 246-256; RT 520-1028]

14. May 9, 1978 — The jury rendered verdicts setting the total fair market value for the 32 parcels, as of September 1, 1972, at $671,250. [CT #1 255-256 and CT #2 122-124]

15. July 28, 1978 — Following a Hearing on July 7, 1978, Judge Caldecott issued his Judgment awarding the Petitioners interest at the legal rate on the amount of their fair market value awards from August 28, 1972, to the date of payment into Court of those awards, based upon a "De Facto" taking of Petitioners' properties by Respondent on August 28, 1972, and *Klopping* "unreasonable delay" damages. [CT #1 282-284 and 323-324; CT #2 135-146; ART 1-11]

    A. The interest award, from August 28, 1972 through June 20, 1978, with respect to the 32 of Petitioners' parcels for which the fair market value was determined by a jury verdict on May 9, 1978,

totalled $268,500. [CT #1 284 and 324-325)

B. The interest award was also applicable to the additional unsettled parcels in Respondent's Airport land acquisition project. Once the fair market value award is determined, by trial or settlement, interest was to be paid by Respondent on each of said awards from August 28, 1972, until the respective awards are paid into Court for Petitioners' benefit. [CT #1 284, 324 and 326-329A]

C. Judge Caldecott reserved for future order by the Court any issue(s) with respect to Attorneys' and Appraiser's fees and other costs of trial with respect to the 32 trial parcels. [CT #1 284 and 324]

16. August 1, 1978 — Judge Caldecott's Judgment of July 28, 1978, was entered.

17. September 11, 1978 — Following Judge Caldecott's death, the Hearing on Respondent's Motion to Tax Costs and Petitioners' Motion for Award of Litigation Costs Pursuant to C.C.P. §1249.3 was assigned to Judge Harry L. Hupp. [CT #2 457] Judge Hupp ruled that, with respect to the 32 trial parcels, Petitioners were entitled to receive attorneys' and appraiser's fees and miscellaneous litigation costs, in amounts to be determined later, pursuant to C.C.P. §§1249.3 and 1246.3 (now C.C.P. §§1250.410 and 1036, respectively) for the following reasons:

A. In making the comparison required by C.C.P. §1249.3, the $268,500 interest awarded by Judge Caldecott, due to a "De Facto" taking and *Klopping* damages, must be added to the jury's fair market value awards, and that total compared with the Respondent's Final Offers and Petitioners' Final Demands. In so doing, the Respondent's Final Offers were unreasonable and the Petitioners' Final Demands were reasonable, for purposes of C.C.P. §1249.3.

B. The "De Facto" taking found by Judge Caldecott amounted to a taking of an interest in Petitioners' properties by Respondent, for purposes of C.C.P. §1246.3. [CT #1 354; CT #2 458-459; ART 55 and 58]

C. However, Judge Hupp also ruled that, if Judge Caldecott had *not* awarded the Petitioners the $268,500 in interest, based upon a "De Facto" taking and *Klopping* damages, then, in making the required comparison, pursuant to C.C.P. §1249.3, to determine the reasonableness of Respondent's Final Offers and Petitioners' Final Demands, said Final Offers and Final Demands would be compared *only* with the jury's awards for fair market value. In addition thereto, Petitioners would *not* be considered successful litigants in an inverse condemnation proceeding for the taking of an interest in their respective properties, pursuant to C.C.P. §1246.3.

Under the above circumstances, Judge Hupp found, as compared with the jury's fair market value awards, the Respondent's Final Offers were reasonable and the Petitioners' Final Demands were also reasonable, and, therefore, Petitioners would not be entitled to receive any attorneys' fees, appraiser's fees or miscellaneous costs, pursuant to either C.C.P. §1249.3 or C.C.P. §1246.3. [CT #2 459-460; ART 40; RT 1056]

18. January 29, 1979 — For the reasons stated above, Judge Hupp, in an Order After Judgment, awarded Petitioners attorneys' fees in the sum of $100,000, appraiser's fees in the sum of $20,000 and miscellaneous costs of $9,805.04, a total of $129,805.04. (CT #2 461-462, 464, 467 and 470; RT 1067]

19. March 29, 1979 — Judge Hupp, in a Second Order After Judgment, dated April 9, 1979, awarded Petitioners an additional $4,000 in attorneys' fees. [CT #2 493; RT 1077]

20. December 14, 1982 — The California Court of Appeal, in *City of Los Angeles v. Property Owners* (1982) 138 Cal.App.3d 114, reversed the award to Petitioners of interest, fees and costs, based upon both a "de facto" taking and an award of "unreasonable delay" damages pursuant to *Klopping v. City of Whittier* (1972) 8 Cal.3d 39 (Petition, Appendix A)

21. January 11, 1983 — The Petitioners' Petition for Rehearing was denied by the California Court of Appeal. (Petition, Exhibit B)

22. March 2, 1983 — The Petitioners' Petition for Hearing was denied by the California Supreme Court. (Petition, Exhibit C)

REASONS FOR DENYING WRIT.

I.

The Petitioners Did Not Comply With Supreme Court Rule 21, by Failing to Raise Properly Any Federal Issue.

The Petitioners did not, at any prior stage of these proceedings, properly raise any issue of federal law. As a result, their Petition does not comply with Rule 21 of the Supreme Court Rules, and is grounds for the denial of their Petition.

Rule 21.1(h) of the Supreme Court Rules, requires the following:

> "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised as to give this Court jurisdiction to review the judgment on writ of certiorari."

Petitioners contend that they raised the federal question with respect to the Fifth and Fourteenth amendments to the United States Constitution in the Answers to the City's condemnation Complaints, Cross-Complaints filed against the City in the condemnation cases, and Complaints in separate inverse condemnation cases brought against the City, which was reiterated in every brief filed in the trial court and on appeal. (Petition, pp. 3-4)

In fact, there is no citation to the United States Constitution in any of said documents. The only citation to any

constitutional provisions found in any document filed by Petitioners prior to the instant Petition is a citation to Article I, Sections 1 and 19 of the California Constitution, found in Petitioners' (Respondents') Brief filed in the California Court of Appeal. Needless to say, the Petition is devoid of any mention of "the way in which [the federal questions] were ruled upon by the Court," and there are no references to places in the record where these matters appear.

The United States Supreme Court "is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised. . . ." (*Edelman v. California* (1953) 344 U.S. 357, 358)

The Petitioners did not comply with the preceding requirements of Supreme Court Rule 21; they did not timely and properly raise any federal issue and, as a result, this Court does not have jurisdiction to review the judgment of the California Court of Appeal on writ of certiorari.

II.

The California Court of Appeal Properly Rested Its Judgment on Nonfederal Grounds.

This Court should not issue the requested Writ of Certiorari because, contrary to the Petitioners' contentions, the California Court of Appeal rested its judgment on adequate state, not federal, grounds.

A writ of certiorari will not issue to review a state court decision if the judgment rests on an adequate state ground. (*Wilson v. Loew's Incorporated* [1958] 355 U.S. 597, 598; *Edelman v. California, supra,* at pp. 363-364; *Johnson v. Thornburgh* [1928] 276 U.S. 601)

Even if the judgment of a state court rests on two grounds, one of which is federal and the other non-federal in character, jurisdiction of the United States Supreme Court fails if the non-federal ground is independent of the federal ground

and adequate to support the judgment. (*Jankovich v. Indiana Toll Road Comm.* [1965] 379 U.S. 487, 489; *Fox Film Corp. v. Muller* [1935] 296 U.S. 207, 210)

In *Jankovich,* it was found to be significant that the state court's opinion did *not* suggest that its conclusion flowed from a federal, rather than a state, source, or that it was based less forcefully on the state constitution rather than the federal constitution. The lower court opinion had relied on both state and federal constitutions. It was held that the state provisions were an independent and adequate state ground of decision which deprived the United States Supreme Court of jurisdiction to review the state court judgment. (379 U.S. at pp. 489-492)

Interestingly enough, even if "the highest court of a state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, [the United States Supreme Court] will not take jurisdiction to review the judgment." (*Stembridge v. Georgia* [1952] 343 U.S. 541, 547)

The California Court of Appeal decision was clearly based upon Article I, §19, of the California Constitution and the California Supreme Court decision in *Klopping v. City of Whittier* (1972) 8 Cal.3d 39.

It should be noted that the provisions of Article I, §19, of the California Constitution go beyond those of the Fifth Amendment to the United States Constitution. The Fifth Amendment to the United States Constitution provides that "private property [shall not] be *taken* for public use, without just compensation." (Emphasis added) On the other hand, Article I, §19, of the California Constitution provides that "[p]rivate property may be *taken or damaged* for public use only when just compensation . . . has first been paid to, or into court for, the owner." (Emphasis added) The "or damaged" provision is unique to the California Constitution;

only the "taking" provision is contained in both the state and federal constitutions.

In their separate inverse condemnation Complaints and in their responsive pleadings to the City's eminent domain Complaints, Petitioners frequently allege that their properties were "taken and damaged" by the City and pray for just compensation for "the taking, damaging and loss of use" of their properties.

As mentioned earlier in this Brief, the *only* citation to any constitutional provisions found in any document filed by Petitioners prior to the instant Petition is a citation to Article I, Sections 1 and 19 of the California Constitution, found in Petitioners' (Respondents') Brief filed in the California Court of Appeal.

In their separate Complaints and responses to City's eminent domain Complaints, Petitioners sought *damages* from alleged unreasonable delays by the City in its eminent domain actions, pursuant to the California Supreme Court's decision in *Klopping v. City of Whittier, supra*. Any payment by the City to Petitioners based on an award pursuant to the *Klopping* decision would be a payment of *damages* to Petitioners, not a payment of compensation for a *taking*. (*Stone v. City of Los Angeles* [1975] 51 Cal.App.3d 987, 997-998)

It is clear from the foregoing, that the Petitioners were seeking compensation for an alleged *taking and damaging* pursuant to Article I, §19, of the California Constitution and the *Klopping* decision by the California Supreme Court, that the California Court of Appeal, in addressing these allegations, rested its judgment on adequate state, not federal, grounds, and, therefore, that this Court should not review the judgment of the California Court of Appeal on writ of certiorari.

Conclusion.

The Petitioners failed to raise properly any federal issue, the California Court of Appeal properly rested its judgment on a nonfederal ground, and, consequently, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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NO. 82-1960

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

EARL BRENNAN, et al.,

Petitioners,

vs.

CITY OF LOS ANGELES,

Respondent.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

INTRODUCTION

The City's Brief in Opposition does not dispute the facts, nor the trial court's eventual conclusion that the City's decade long delay in acquiring the subject properties resulted in a de facto taking of property which Constitutionally requires compensation. 1/

1/ The City's factual statement does appear to dwell unduly on an initial trial court ruling (later vacated) that there was no de facto taking. However, as a matter of California procedural law, the second trial judge acted within his power by vacating that holding and making a contrary one. (*City of Los Angeles v. Tilem* [1983] 142 Cal.App.3d 694, 706.) The City's brief also distracts by discussing state law issues not brought here by the Petition.

Nor does the City's Brief dispute the nationally chaotic state of the law as to what constitutes a de facto taking of property in the Constitutional sense, or the California courts' erroneous application of the law developed by this Court.

Rather, the City contends that the federal Constitutional issues were neither raised nor ruled on below.

The City is wrong.

THE FEDERAL CONSTITUTIONAL ISSUES WERE PROPERLY RAISED

State procedure generally governs how Federal questions are to be raised, although as a matter of Federal Constitutional law, no particular form is necessary:

> "[i]f the record as a whole shows *either expressly or by clear intendment* that this was done, the claim is to be regarded as having been adequately presented." (***New York ex rel. Bryant v. Zimmerman*** [1928] 278 U.S. 63, 67; emphasis added.)

With respect to 14th Amendment deprivation of property questions, California has dispensed with the necessity to differentiate between the State and Federal Constitutional guarantees by holding itself bound to apply this Court's rulings in all circumstances:

> "The constitution of California provides that no person shall be deprived of his property without due process of law. (Art. I, § 13.) [Now Art. I, § 19.] This is also declared by the fourteenth

> amendment to the constitution of the United States. *The question whether or not this act operates to deprive persons of property without due process of law, is therefore, a federal question*, upon which the decisions of the supreme court of the United States are controlling authority." (***Brookes v. City of Oakland*** [1911] 160 Cal. 423, 427; emphasis added.)

In conformity with California practice, the Property Owners' initial pleadings alleged that their properties had been taken by the City's actions, without compensation and without due process of law.

When the de facto taking issue was tried, the brief filed by the Property Owners was based heavily on Federal Constitutional law urging that:

(1) A de facto taking occurs when the actions of a government agency severely interfere with an owner's ability to sell or use his property, citing ***Foster v. City of Detroit*** (E.D. Mich. 1966) 254 F.Supp. 655; ***Drakes Bay Land Co. v. United States*** (Ct Cl 1970) 424 F.2d 574; and ***Shoshone Tribe v. United States*** (1936) 299 U.S. 476;

(2) In de facto taking cases, the date of value is the date of the de facto taking, citing ***Foster; Drakes Bay***; and ***Madison Realty v. City of Detroit*** (E.D. Mich. 1970) 315 F.Supp. 367; and

(3) Deprivation of the ability to use property is compensated by awarding interest from the date of deprivation, citing ***Jacobs v. United States*** (1933) 290 U.S. 13; ***United States v. Klamath & Modoc Tribes*** (1937) 304 U.S. 119; ***Smyth v. United States*** (1937) 302 U.S. 329; ***Shoshone Tribe v. United States*** (1936) 299 U.S. 476; ***Seaboard***

Airline R. Co. v. United States (1922) 261 U.S. 299; and *United States v. Rogers* (1920) 255 U.S. 163.

The Property Owners based their right to recover on these arguments and these authorities throughout the litigation — in trial and on appeal.

The Federal Constitutional issues were thus central to the Property Owners' presentation of the case, both through the extensive reliance on Federal law, and through the California Supreme Court's holding in *Brookes* that Federal law is controlling.

THERE IS NO ADEQUATE NON-FEDERAL GROUND FOR THE DECISION

Alternatively, the City suggests that the Petition be denied because the decision below was based on non-Federal grounds:

> "The California Court of Appeal decision was clearly based upon Article I, §19, of the California Constitution and the California Supreme Court decision in *Klopping v. City of Whittier* (1972) 8 Cal.3d 39." (Br. in Opp., p. 10.)

The City is wrong.

First. A decision based on Cal. Const. Art I, §19 is not *independent* from the 14th Amendment. As noted above, the California Supreme Court has held itself bound by this Court's 14th Amendment decisions in property deprivation cases. *(Brookes*, 160 Cal. at 427.) Recent California taking cases show the California Court's continuing attempt

(though not always free from error) to apply this Court's decisions. (*See, e.g., **Agins v. Tiburon*** [1979] 24 Cal.3d 266, 273-275.)

Lack of an *independent* state ground gives this Court jurisdiction. (***Enterprise Irrig. Dist. v. Farmers' Mut. Canal Co.*** [1917] 243 U.S. 157, 164.)

Second. An interpretation of the California Constitution which deprives the Property Owners of rights guaranteed by the Federal Constitution is a reason to *take* this case, not reject it. (*See, e.g., **Pruneyard Shopping Center v. Robins*** (1980) 447 U.S. 74, 79-80.) In ***Pruneyard***, the California Supreme Court based its decision on Article I, §§ 2 and 3 of the California Constitution. This Court took jurisdiction because that interpretation adversely affected property riqhts protected by the 14th Amendment.

Third. The de facto taking concept of ***Klopping v. City of Whittier*** (1972) 8 Cal.3d 39 was drawn directly from Federal Constitutional jurisprudence, i.e., ***Foster v. City of Detroit*** (E.D. Mich. 1966) 254 F.Supp. 655, aff'd (6th Cir 1968) 405 F.2d 138 (*see **Klopping***, 8 Cal.3d at 46).

Thus, the de facto taking part of ***Klopping***, which was central to the decision below, is not independent of Federal law either.

Finally. It is precisely because California's interpretation of Constitutional precepts conflicts with those made by this Court that jurisdiction appropriately rests in this Court to review the decision. In purported reliance on this Court's rulings, California has:

- concocted a rigid rule requiring physical invasion or legal restraint before a de facto taking may be found, where this Court's *actual* rule rests on flexible examination of all facts;

- held that years of stultification of land use *cannot* result in a taking, creating *direct* conflict with the Ninth Circuit Court of Appeals; and
- denied compensation for unreasonable delay in consummating a taking, in conflict with the theory of numerous decisions of this Court.

The decision below is at least so interwoven with Federal law as not to be independent of it. (***Enterprise Irrig. Dist.***) Review is not only proper, it is necessary to bring California's decisions on Federal Constitutional issues in line with this Court's paramount teachings. (***Pruneyard.***)

CONCLUSION

The City cannot deny the discord between this Court's holdings and the decision below.

The City's lame attempt to forestall review and rectification of the erroneous California position (and resolution of the unseemly nationwide conflict) ought not prevail.

The Property Owners pray that a writ issue.

Respectfully submitted,

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